No. 4286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOBBS WALL & COMPANY
(a corporation),
Plaintiff in Error.

vs.

S. PETTERSON,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

H. W. HUTTON,
Attorney for Defendant in Error.

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I.

STATEMENT OF FACTS.

We respectfully state to the Court that the following statement on page 3 of plaintiff in error's brief is not in accordance with the record:

> "But on cross-examination admitted that he actually had not looked to see whether or not it had such nosing, either at the time it fell (Tr. p. 41) or at any time prior thereto" (Tr. p. 40).

We also call the Court's attention to the following on page 3 of said brief, to wit:

> "It was admitted that on a block in use on board ship it is customary and proper to have

> a nosing of rope yarn, marlin or wire tied across the mouth of the hook, in order to prevent the hook from jarring out of the eye."

That being the result of experience, the indisputable inference is, that the hook will not jar out if the nosing is there.

He did say on page 40 that he had not seen the block prior to its fall but stated distinctly that he looked at it when it fell and could see there had been no nosing on it. What he said on page 41 is as follows:

> "A. I did not look at it in particular for that; I picked it up and looked at it, and I says to myself, 'There should have been a nosing around that block.' "

We respectfully submit that he directly states in that answer that he looked at the block and concluded there was no nosing on it; the only part of his answer that qualifies that, is the first part, and all he says in that is that he did not pick it up for that particular purpose.

There is no insufficiency of evidence in this case, neither was there any speculation, and as to the motion for a judgment by plaintiff in error at the close of the case, the Court said, Tr. p. 59:

> "The COURT. The motion will be taken into consideration and the whole matter determined at one and the same time."

The Court did that by rendering judgment for plaintiff, and as to the motion itself it added noth-

ing to the case, the evidence was all in and it was for the Court to determine the whole case, motion or no motion, and it did.

The facts of the case show that plaintiff in error operated its vessel "Crescent City" for at least two years with an unused block dangling in a hook about 100 feet above the deck; the block had originally been a part of a wireless apparatus. Why it was left there does not appear; it appears to have been used twice in a few months—once when they painted the mast and another time when they used it to reeve signal halyards through to decorate the vessel with flags—but it was not a signal halyard block. The master of the vessel testified, Tr. p. 50:

> "That block is not the usual signal halyard block; they are much smaller sized."

In the meantime the ship rolled when at sea, when they were working cargo, or raising or lowering the booms, and the following was liable to happen. Testimony of the master of the vessel, page 50:

> "If there had been a nosing there it is possible for it to have been broken off by the severe vibration of the mast, such as would occur in loading or from shaking of the mast with the steam winch; a heavy sea might also do it, but this does not happen very often. This mast had been in use for three or four days in loading and had been vibrating during all this period. Such vibration might have affected or broken the nosing; I have never seen that happen, but it is liable to * * *."

Page 51:

> "In heavy rolling the block would roll from side to side. I am not prepared to say that it would not roll over on the marlin and chafe it. I don't think the block would shake up and down unless the hook was very slack. The mast rolls considerably when you are loading and unloading cargo."

On the day of the accident in this case they had finished loading cargo, and defendant in error was told to lower the booms which he proceeded to do.

The only thing in the record about his doing that work in an improper manner is that of the witness Selfridge, who was in his room writing a letter, and all he knows about it is that he thought the winch made a great deal of noise, Tr. pp. 52 and 53, but he said on cross-examination, pages 54 and 55:

> "Winches always make considerable clattering when they are used."

Page 55:

> "The mast always shakes when you are hoisting cargo; when you are hoisting cargo there is always a lot of shaking and noise and clattering on deck."

Defendant in error testified, page 43, that he was used to running winches.

And plaintiff in error's witness Sorenson testified that when the boom was half way down, the block at the head of the mast came down and struck defendant in error, that witness testifying on page 48:

> "You lower the booms by the tackle and that always causes the mast to shake, just the same as when you are hoisting cargo, that causes the mast to shake; at times it shakes considerably. The booms on the 'Crescent City' are probably 60 feet long; each load weighs a ton, and in hoisting a ton weight on a boom it is bound to shake the thing that it is suspended to. This goes on all the time on board ship. We were lowering the booms in the proper manner at the time the block came down, just the same as they were always in the habit of being lowered."

So with a block that was an unusued block about a foot from the top of the mast, where a person desiring to inspect it had to climb up twenty feet of mast away up in the air, and of course no one would so climb, and a block that was likely to have the nosing chafed off, they continued to run this vessel; we submit that was negligence of the grossest character; the nosing was bound to rot or chafe off some day; it had done so this day, otherwise the block could not have come down, and the accident happened.

The case was tried before the Court sitting without a jury; the Court saw the witnesses and heard them testify and made findings of fact which this Court will not disturb, and each finding of fact is supported by testimony. We call the Court's attention to the following, page 15:

> "It is obvious that a roll or careen of the ship will be magnified in sway or sweep of the mast tops. Hence the necessity to supply and

maintain guards or keepers on block hooks there suspended. This rolling or careening of the ship is ordinary, usual and anticipated. It is also clear that if this hook ever had a guard or keeper, it weathered and broke away at the time of the fall or prior thereto."

Page 16:

"In these circumstances, although it is probable plaintiff's conduct or acts caused the hook to escape the eye-bolt, it precipitated the fall. Such conduct or acts, though contributing to the block's fall, in legal contemplation are not the *cause* of the block's fall but only a *condition* thereof. * * *

The proximate cause was the absence or weakness of the guard or keeper, due to defendant's failure to discharge their duty, whether to make seaworthy with reasonable diligence to maintain."

That finding is supported by the evidence. plaintiff, page 36:

"The purpose of the nosing is to prevent the block from unhooking."

Page 42:

"A. Yes, it might be that there has been such a thing as a nosing on that block and that nosing has been torn out by hanging up there and swinging."

E. B. Butzing, the master of the vessel, defendant's witness, page 49:

"It is customary with a block like that to put a nosing around. The nosing is usually made of cord or marlin or rope yarn; they seldom put wire on it."

Two blocks were offered in evidence; they speak for themselves. The purpose of the nosing is apparent; if there is a nosing on the block it cannot jar out and fall.

Plaintiff, defendant in error, testified as follows:

> "I had never been up to where the block was on the mast; there was a block on the foremast, but not a block like this. It is not usual to have a block like that hanging on the foremast."

Same page:

> "The second mate on board a vessel does as the first mate and captain tell him to do; he is supposed to report if he sees anything wrong, or anything like that, which I did report, but the mate is the man that makes inspections and takes care of the general gear."

II.

ARGUMENT.

Plaintiff makes about one point, that is that defendant in error relied on the absence of a nosing, and that it was not proved. It is clear that if there had been a nosing the block could not have fallen out; an inspection of the block in evidence shows that.

The Court found that it was either the absence of or breaking of the nosing that caused the injury; that is conclusive, and anyone by looking at

the block would have sufficient evidence before him to conclude that.

Plaintiff in error overlooks several principles of evidence in its brief as follows:

> "Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. * * *"

This block came down; the form of the hook on the block with its end turned up shows it is designed to hold a wire or other binding around it to stop the hook from jarring out of what it is suspended in; then similar blocks are in evidence. There are four kinds of evidence as follows:

> "The knowledge of the Court;
> The testimony of witnesses;
> Writings;
> Other material objects presented to the senses."

In this case we have the testimony of defendant in error that the block could not have fallen if there had been a nosing on it; that is also clear from the material objects presented to the senses in this case, the blocks themselves.

We also have the following, which is apparent, page 36:

> "That is a nosing that goes around the end of the block and this way (witness illustrating how nosing goes around the end of block). It

> can *never,* that is commonly done when they have blocks hanging up at any height, *come unhooked then.* The purpose of the nosing is to prevent the block from unhooking."

The evidence and findings herein are conclusive against plaintiff in error on that point.

But we have other grounds, Paragraph II of complaint, page 2 of transcript:

> "That at the time said vessel left the said State of California she was unseaworthy and her appliances were defective, as she had an unused, what is called a block, hanging on her mainmast about one hundred and ten feet above her deck."

That was negligence in itself to have a block in such a place, that was subject to the action of the weather, the rolling of the vessel and the increased rolling of the mast, and the excessive shaking of the mast when cargo was being laden or unladen; the nosing being of manila it was bound to wear out, chafe or rot, and the block was in such a place that no one would care to go up and inspect it. There is a charge of unseaworthiness, seaworthiness is reasonably safe. The block was unused; anything that is used for a temporary purpose twice in several months is an unused block; it had nothing to do with the unloading of the cargo or the operation of the vessel; it was simply dangling up there as the mast swayed or shook. This vessel was not reasonably or at all safe.

It was the duty of the mate to inspect the vessel; there is no evidence he ever did. Paragraph IV of complaint, page 3:

> "and it being so suspended without any fault on his part as it was the duty of the defendant by and through the master and mate of the vessel to keep vessel and her appliances and parts in order, and not the duty of the plaintiff."

The evidence of both defendant in error and the master of the vessel substantiate that allegation. And there does not seem to have been any inspection. It was for plaintiff in error to show it if there had been, but they failed to do so. There is no contradiction of the testimony that it is usual to have a nosing, and no contradiction of the testimony that the block would not have fallen if there had been a nosing.

III.

RES IPSA LOQUITUR.

The Court did not apply that doctrine to this case, but could have done as plaintiff in error claims defendant in error produced no evidence, as there is one unvarying rule that when anything falls, the burden rests upon the party under whose control it is to explain the falling. The mere falling makes out a case.

There is little if any difference between this and the following cases. In the case of *The Joseph B. Thomas,* 86 Fed. 658, someone had placed a bucket on a hatchway cover that was liable to tip; someone stepped on the hatch cover, it tipped, and the bucket fell down into the hold and struck a man. And this Court said on page 662:

> "But it often happens that the evidence which shows the injury and the manner in which it occurred, also establishes a prima facie case of negligence, and raises such a strong presumption as to cast upon the opposite party of introducing proof of other facts in order to show that there was no negligence."

In this case a block had been left suspended for, as far as we can learn, about two years on a mast that all the evidence showed jarred, rolled and shook at about all times in port when cargo was being handled, booms lowered, or other work done; and at sea by the rolling of the vessel. There was no necessity for the block to have been there. Anyone might have known that it would fall some day, and it did fall. If defendant in error had been a few inches from where he was it would have killed him. This Court further said, on page 663:

> "But it was not the covers, nor the person that stepped on the covers, that was the real cause of the injury. You can twist and turn the facts in any direction which the ingenuity and ability of counsel may suggest, but the mind is inevitably forced to the conclusion that it was the negligent placing of the keg in a dangerous position that constituted the efficient

> cause of the injury. It was the natural result which, in the light of the attending circumstances, the appellants ought to have foreseen might occur when the keg was placed upon the covers; and on which, by the exercise of ordinary care and prudence, they should have guarded against. They were required to use such precautions to avoid danger as a person of ordinary prudence would use for his own protection. It makes no difference whether it was a man or a dog that ran against or stepped upon the covers, or whether it was a jar occasioned by the falling of a heavy box, or a gale of wind. It was the placing of the keg in such a position that it was liable to be upset from any of these causes that constitutes the negligence and creates the liability, notwithstanding the fact that there were other causes which may have immediately or remotely contributed to the accident."

There is no reason this block could not have been taken down and replaced each time they wanted to use it. If they had left the halyards in it that would have kept it in place, but they did not.

In the following case decided by the United States Circuit Court of Appeals for the Second Circuit, December 3, 1923 (*The Marschall*, Vol. II American Maritime Cases No. 2, page 144), a topping lift fell, and the Court says:

> "The falling of the topping lift in the manner described raises a presumption of negligence, and the doctrine of *res ipsa loquitur* applies. (Central R. R. Co. v. Pelusa, 286 Fed. 661.) In that case, this Court recently had occasion to review the Federal as well as the

> New York State authorities on this subject." * * * Page 146.
>
> "We think that from the break occurring in the manner described it presumptively appears that the appellant failed in its duty to keep the band and ring in proper condition."
>
> *Jager v. California Bridge Company,* 104 Cal. 542;
>
> *Dyas v. Southern Pacific Co.,* 140 Cal. 296.

Defendant in error testified (Tr. page 36) that there had not been any nosing on the block; and on page 35,

> "The block had nothing to do with the booms. I don't know what the block was there for."

The master of the vessel testified, page 58,

> "I don't know whether the block was originally there for wireless. The block was within a foot or two of the top of the mast. I don't know what the block was there for originally."

It seems idle for counsel to claim that there is no evidence that there was no nosing on the block. Defendant in error testified there was none, as above, but the circumstances show it just as conclusively.

Counsel claims that the doctrine of *res ipsa loquitur* does not apply (page 21 of their brief):

> "And even if the doctrine could apply it would not apply in this case, as defendant introduced evidence explaining the cause of the accident, which evidence was not overcome by plaintiff."

We assume they refer to the evidence given by the witness Selfridge. All that he testified to was that he heard a noise; whether the noise was before, after, or at the time the block fell he does not know, as all he knows about the accident was what someone told him after it occurred. We submit that his evidence is not proof of anything, and does not explain anything.

We respectfully submit that the record in this case is without error, and ask that the judgment be affirmed.

Dated, San Francisco,
November 5, 1924.

H. W. Hutton,
Attorney for Defendant in Error.